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No. 83-1845

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

ALPHA OTIS O'DANIEL STEPHENS,
Petitioner,

v.

RALPH KEMP, WARDEN, GEORGIA DIAGNOSTIC AND CLASSIFICATION CENTER,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION FOR THE RESPONDENT

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QUESTIONS PRESENTED

1.

Whether the Court of Appeals correctly concluded that Petitioner's second application for federal habeas corpus relief constituted an abuse of the writ under 28 U.S.C. § 2254, Rule 9(b), and thus properly denied Petitioner's application for a certificate of probable cause to appeal and requested stay of execution?

2.

Notwithstanding the fact that the district court, and the circuit court, properly found the subject habeas corpus petition to constitute an abuse of the writ under 28 U.S.C. § 2254, Rule 9(b), and thus properly denied Petitioner's prayers for relief, whether Petitioner's proffer of the

Baldus statistical impact study at the November 15, 1983 habeas corpus evidentiary hearing was sufficient to satisfy the materiality requirement of Townsend v. Sain, 372 U.S. 293 (1963) so as to entitle Petitioner to an evidentiary hearing on his claim of arbitrary and discriminatory application of the death penalty?

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ON PETITION FOR A WRIT OF CERTIORARI
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BRIEF IN OPPOSITION FOR THE RESPONDENT

PART ONE

STATEMENT OF THE CASE

In the late hours of December 13, 1983, upon the eleventh hour request

of the Petitioner and over the opposition of the Respondent, this Court, on review of an incomplete record on an abusive petition, granted Petitioner a stay of his scheduled December 14, 1983 execution ". . . pending the decision of the United States Court of Appeals for the Eleventh Circuit in Spencer v. Zant, 715 F.2d 1562 (11th Cir. Dec. 1983) rehearing en banc granted, or until further Order of this Court." An examination of this response in opposition to Petitioner's request that a writ of certiorari issue, and the record as now presented, reveals that the subject stay was improperly granted and that Petitioner's application for the writ should be denied.

Respondent incorporates, as if fully set forth herein, the extensive "Procedural History" contained in his previously filed Application for Reconsideration and Vacation of this Court's Order Staying Petitioner's Execution.

PART TWO

REASONS FOR NOT GRANTING THE WRIT

A. THE COURT OF APPEALS CORRECTLY CONCLUDED THAT PETITIONER'S SECOND APPLICATION FOR FEDERAL HABEAS CORPUS RELIEF CONSTITUTED AN ABUSE OF THE WRIT UNDER 28 U.S.C. § 2254, RULE 9(b), AND THUS PROPERLY DENIED PETITIONER'S APPLICATION FOR A CERTIFICATE OF PROBABLE CAUSE TO APPEAL AND REQUESTED STAY OF EXECUTION.

In Potts v. Zant, 638 F.2d 727, 647 (5th Cir. 1981), the court noted that under such decisions as Price v.

Johnston, 334 U.S. 266, 292 (1948), the burden rests initially upon the Government to plead abuse of the writ. Accord, Sanders v. United States, 373 U.S. 1, 10 (1963). See 28 U.S.C. § 2254 Rule 9(b).

Once abuse of the writ has been pled, as in this case, " . . . the prisoner has the burden of answering that allegation and of proving that he has not abused the writ." Price v. Johnston, 334 U.S. at 292. See Galtieri v. Wainwright, 582 F.2d 357, n. 18. Mays v. Balkcom, 631 F.2d 48 (5th Cir. 1980).

The circuit court and the district court below correctly concluded that the subject habeas corpus petition constitutes a classic example of abuse of the writ. Subsection (b) of Rule 9

provides that upon a finding of abuse of the writ, i.e., an inexcusable neglect in not presenting the claims on the original petition, deliberate bypass of orderly state and federal procedures or a waiver of Petitioner's right to raise the untimely claims, the federal district court may dismiss the petition.

(i)

In the district court, and in the circuit court on appeal, Petitioner asserted seven constitutional claims.

Addressing first Petitioner's claims that (a) his confession was elicited while he was under the influence of alcohol or drugs, (b) that his trial counsel rendered ineffective assistance, (c) that the

traverse jury which convicted him was selected from an unconstitutionally composed venire,[1] (d) that the trial court failed to order sua sponte a competency hearing to determine if Petitioner was competent to stand trial, and (e) that appellate procedures in Georgia do not provide an adequate review of the proportionality of capital cases, Respondent notes that the district court and the circuit court correctly ascertained that Petitioner presented " . . . a single excuse for his failure to have filed these claims in

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[1]The circuit court also treated this claim under a "newly discovered statistical evidence" analysis and found it to be without merit. Stephens v. Kemp, 721 F.2d 1303.

his prior habeas petition - the ineffectiveness of his first habeas counsel." Stephens v. Kemp, 578 F.Supp. 103, 107-108 (M.D. Ga. 1983) Accord, Stephens v. Kemp, 721 F.2d 1300, 1303-1304 (11th Cir. 1983). (Emphasis added).

As is revealed by an examination of the transcript of the November 15, 1983 evidentiary hearing had in the district court, (Respondent's Appendix D, previously submitted in conjunction with Respondent's motion to Reconsider and Vacate Stay), at which hearing counsel for Petitioner was afforded an opportunity to present evidence to rebut Respondent's claim of abuse of the writ under 28 U.S.C. § 2254 Rule 9(b), counsel for Petitioner in fact

presented absolutely no evidence to rebut the Respondent's assertion of abuse of the writ.[2] Petitioner's contentions of ineffective assistance of trial and prior habeas counsel constitute nothing more than "bare allegations" which cannot constitute "cause" under Francis v. Henderson, 425 U.S. 536 (1976), and similarly fail to constitute a legitimate "excuse" under 28 U.S.C. § 2254 Rule 9(b).

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[2]Noting Petitioner's complete failure to produce any evidence at the November 15, 1983 evidentiary hearing on his abusive petition, the circuit court opined: "Plaintiff's suggestion that he could produce evidence at a subsequent hearing does not satisfy his burden." Stephens v. Kemp, 721 F.2d at 1303, n.1.

Regarding Petitioner's contention that the trial court violated his constitutional rights by failing to instruct the jury at the penalty phase of his trial that it could not impose the death penalty absent a clear finding that Petitioner himself killed, attempted to kill or intended to kill the victim (Enmund v. Florida, 458 U.S. 782 (1982), Petitioner asserted that his excuse for failing to raise this allegation on his first habeas corpus application was an alleged intervening change in the law. See Enmund v. Florida, supra.

An examination of this Court's decision in Enmund, supra, reveals that the instant case is factually distinguishable from Enmund, and that

Enmund is not applicable to Petitioner's case. See Johnson v. Zant, 249 Ga. 812, 816, 295 S.E.2d 63 (1982). Unlike in Enmund, supra, where the evidence revealed that "Enmund himself did not kill or attempt to kill . . . " the evidence in Petitioner's case revealed that Stephens savagely beat the crippled victim, kicked him repeatedly, kidnapped and transported him to a secluded area and then placed a .357 magnum to the victim's ear and shot him twice at point blank range. See Stephens v. State, 237 Ga. at 259.

Because Enmund is not possibly applicable to Petitioner's case, his claim that the trial court violated his constitutional rights by failing to give the jury an "Enmund" charge

constitutes an abuse of the writ, and as such, was properly dismissed. Stephens v. Kemp, 721 F.2d 1303.

(iii)

Lastly, Petitioner asserted challenges to Georgia's capital sentencing statute and the composition of his jury array. Petitioner argued that his death sentence was arbitrarily and unequally imposed based upon the race of the defendant and victim, and that blacks and women were underrepresented and systematically excluded from his jury array.

At the November 15, 1983 evidentiary hearing, Petitioner asserted, as his excuse for failing to raise these claims in his prior habeas

corpus petition, that the same were based upon newly discovered statistical evidence.

As correctly noted by the circuit court, Petitioner's "excuse" was totally insufficient to justify a consideration of the subject claims on this second or successive petition. Stephens v. Kemp, 721 F.2d at 1303. The statistical evidence which Petitioner alleged to possess in support of his jury claim was found not to be "newly discovered." Id.

Regarding Petitioner's claim of the arbitrary and discriminatory application of capital punishment, the circuit court noted that in order to prevail on such a claim the Petitioner must prove "'some specific act or acts evidencing intentional or purposeful

. . . discrimination against [the petitioner]' on the basis of race, sex or wealth." Stephens v. Kemp, 721 F.2d at 1303. The circuit court found, as a matter of fact, that at the November 15, 1983 evidentiary hearing Petitioner proffered no evidence of any kind in support of his contention. In distinguishing the instant case from Spencer v. Zant, 715 F.2d 1562 (11th Cir. 1983) rehearing en banc granted December 13, 1984, the circuit court noted the foregoing failure of Petitioner to make an evidentiary proffer, along with the fact that Spencer v. Zant, unlike the instant case, was not an abusive petition.

(B) NOTWITHSTANDING THE FACT THAT THE DISTRICT COURT AND THE CIRCUIT COURT PROPERLY FOUND THE SUBJECT HABEAS CORPUS PETITION TO CONSTITUTE AN ABUSE OF THE WRIT UNDER 28 U.S.C. § 2254 RULE 9(b), AND THUS PROPERLY DENIED PETITIONER'S PRAYERS FOR RELIEF, PETITIONER'S PROFFER OF THE BALDUS STATISTICAL IMPACT STUDY AT THE NOVEMBER 15, 1983 EVIDENTARY HEARING WAS WOEFULLY INSUFFICIENT TO SATISFY THE MATERIALITY REQUIREMENT OF TOWNSEND V. SAIN 372 U.S. 293

(1963) SO AS TO ENTITLE PETITIONER TO AN EVIDENTIARY HEARING ON HIS CLAIM OF ARBITRARY AND DISCRIMINATORY APPLICATION OF THE DEATH PENALTY.

Assuming arguendo, that the district court and the Eleventh Circuit Court of Appeals incorrectly found an abuse of the writ with reference to Petitioner's claim that the death penalty in Georgia is applied in an arbitrary and discriminatory manner, an examination of Respondent's Appendix D, i.e., the transcript of the November 15, 1983 evidentiary hearing had in the district court, reveals that Petitioner completely failed to

establish his entitlement to an evidentiary hearing under Townsend v. Sain, 372 U.S. 293 (1963) upon the aforementioned claims.

MATERALITY

In Townsend v. Sain, 372 U.S. 293 (1963), the Court held that "a federal evidentiary hearing is required unless the state-court trier of fact has after a full hearing reliably found the relevant facts." Id. at 313. After noting that "[s]ome particularlization may . . . be useful" the Court enumerated six circumstances under which an evidentiary hearing would be required.

In the instant case, Petitioner's claim to an evidentiary hearing in the district court rested upon the fifth

enumerated circumstance, i.e., that a material fact was not developed at the state court hearing. In order to meet the first prong of the Townsend test, i.e., the materiality requirement, a petitioner must show that a basic, primary or historical fact, in the sense of a recital of external events and the credibility of their narrators, was not developed at the state court proceeding, and that if developed, such fact would entitle him to relief in a habeas corpus action. Accord, Thomas v. Zant, 697 F.2d 977, 986 n. 11 (11th Cir. 1983).

With the foregoing definition of "materiality" under Townsend in mind, Respondent now examines the evidence proffered by Petitioner at the November 15, 1983 evidentiary hearing.

THE PROFFER

An examination of Respondent's Appendix D at page 41 reveals the Petitioner's proffer of the Baldus statistical impact study.

EIGHTH AMENDMENT

Under Georgia's present statutory scheme, " . . . [n]o longer can a jury wantonly and freakishly impose the death sentence; it is always circumscribed by the legislative guidelines." Gregg v. Georgia, 428 U.S. 153, 206-207 (1976). See also, Stephens v. Kemp, ___ U.S. ___, 78 L.Ed.2d 370, 104 S.Ct. ___, 1983) (Powell, J., dissenting). Further, ". . . the review function of the Supreme Court of Georgia affords

additional assurance that the concerns that prompted the [Court's] decision in Furman [an Eighth Amendment case] are not present to any significant degree in the Georgia procedure applied here." Gregg at 207.

Statistics allegedly evidencing a disparate racial impact alone, whether they be statewide or by county, are immaterial and are not crucial to a fair, rounded development of the material facts if a state, as has Georgia in this instant case, follows a properly drawn capital sentencing statute. On an Eighth Amendment challenge, in light of this Court's decision in Gregg v. Georgia, supra, ". . . in the absence of proof of 'some specific act or acts evidencing intentional or purposeful . . .

discrimination against' [a particular petitioner] on the basis of race, sex or wealth, a petitioner is not entitled to relief on habeas corpus." Smith v. Balkcom, 660 F.2d 573, 585 (5th Cir. Unit B 1981).

Thus, under the first prong of the Townsend test, it is readily apparent that Stephens' proffer completely lacks any evidence of intentional and purposeful discrimination against him based on race, sex or wealth. Accordingly, the same fails to rise to the level of a material fact under Townsend v. Sain, supra.

EQUAL PROTECTION

In the equal protection context, Petitioner claims that the death penalty is being imposed in the State

of Georgia pursuant to a pattern and practice of discrimination based upon race, sex and poverty. In Smith v. Balkcom, 671 F.2d 858, 859 (5th Cir. Unit B 1982), the court, citing Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977), noted that statistical evidence of disparate racial impact alone is insufficient to establish a violation of the Fourteenth Amendment for there must be a showing of an intent to discriminate; however . . .

> In some instances, circumstantial or statistical evidence of racially disproportionate impact may be so strong that the results permit no other inference but

> that they are the product of a racially discriminatory intent or purpose. (Cite omitted).

In the equal protection context, statewide, general or nonparticularized statistical data allegedly evidencing a disparate racial impact alone is immaterial. Only when the data is adjusted to the appropriate prosecutorial unit, i.e., by county, and "[o]nly if the evidence of disparate impact is so strong that the only permissible inference is one of intentional discrimination will it alone suffice" to support a Fourteenth Amendment equal protection challenge. Adams v. Wainwright, 709 F.2d 1443, 1449 (11th Cir. 1983). Accord, Spinkellink v. Wainwright, 578 F.2d

582 (5th Cir. 1978). See Smith v. Balkcom, 671 F.2d 858, 859 (5th Cir. Unit B 1982). Stephens v. Kemp, 78 L.Ed.2d at n. 2.

An examination of Petitioner's proffer reveals the absolute insufficiency of the same to carry the Petitioner's burden under the first prong of the Townsend test, i.e., the demonstration of "materiality." It is readily apparent that Petitioner's proffer, insufficient as it was, constituted nothing more than the type of general, statewide, nonparticularized "impact study" critized by Justice Powell in his dissent in Stephens v. Kemp, supra, n. 2.

Having demonstrated Petitioner's complete failure to meet the first

prong of the Townsend test, i. e., to demonstrate the existance of some undeveloped material fact, or facts crucial to a fair, rounded development of a material fact, there clearly exists no necessity to explore the second prong of the Townsend test, i.e., whether the failure to develop the material facts at the state proceeding was attributable to Petitioner's inexcusable neglect or deliberate by-pass.

CONCLUSION

As is revealed by an examination of the circuit court's opinion, that court properly determined that the subject petition constituted an abuse of the writ under 28 U.S.C. § 2254 Rule 9(b). Having determined that the

instant petition was abusive, and that Petitioner had completely failed to carry his burden of establishing a legitimate excuse to alleviate the sanctions afforded by Rule 9(b), the circuit court properly denied Petitioner's application for a certificate of probable cause to appeal and request for a stay of execution. Stephens v. Kemp, 721 F.2d 1300 (11th Cir. 1983).

In this case Petitioner has been denied relief in every court confronted with this abusive application for habeas corpus relief. This Petitioner has been afforded full and fair hearings in the state habeas corpus courts, in the federal district court, and expedited review and consideration by a three judge panel

of the Eleventh Circuit Court of Appeals and by the Eleventh Circuit Court of Appeals on en banc consideration. The foregoing analysis reveals the inapplicability of Spencer v. Zant, 715 F.2d 1562 (11th Cir. 1983) to this case, and thus, the irrelevancy and immateriality of the circuit court's decision in Spencer v. Zant, supra to the disposition of this matter. Accordingly, Petitioner's petition for a writ of certiorari should be denied and this Court's stay of execution should be vacated.

Respectfully submitted,

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(Signatures continued)

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CERTIFICATE OF SERVICE

I, William B. Hill, Jr., Attorney of Record for the Respondent and a member of the Bar of the Supreme Court of the United States certify that in accordance with the rules of the Supreme Court of the United States I have this day served true and correct copies of this Brief in Opposition for the Respondent upon the Petitioner's counsel by depositing three copies of this pleading in the United States mail with proper address and adequate postage to:

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